83-586

No.

OCT 8 1983
ALEXANDER L. STEVAS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

Shell Petroleum N.V.,

Petitioner,

—against—

MICHAEL FRANCHETTI, KENNETH CORY, WILLIAM M. BENNETT, INDIVIDUALLY AND AS MEMBERS OF, AND GERALD H. GOLDBERG, INDIVIDUALLY AND AS EXECUTIVE OFFICER OF, THE FRANCHISE TAX BOARD, STATE OF CALIFORNIA,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PAUL M. DODYK
Counsel of Record
STEWARD R. BROSS, JR.
JOHN R. HUPPER
RICHARD W. CLARY
MICHAEL G. VALENTINI
One Chase Manhattan Plaza
New York, N.Y. 10005
(212) 422-3000

CRAVATH, SWAINE & MOORE
One Chase Manhattan Plaza
New York, N.Y. 10005
(212) 422-3000

MCCUTCHEN, DOYLE, BROWN & ENERSEN
Three Embarcadero Center
San Francisco, California 94111
(415) 393-2000
Of Counsel

October 8, 1983

QUESTIONS PRESENTED

Two United States subsidiaries of petitioner Shell Petroleum N.V. ("SPNV"), a Netherlands company, are being assessed by the State of California for franchise taxes computed by a unitary taxation formula on the combined worldwide income of SPNV and its more than 900 affiliates around the world. SPNV seeks to assert in Federal court its rights to challenge such taxation under the Treaty of Friendship, Commerce and Navigation between the United States and the Kingdom of The Netherlands ("the Netherlands FCN Treaty"), the United States Constitution and international law. Under California law, SPNV cannot assert its rights in any California forum, and, if the decision below is allowed to stand, it is unlikely that SPNV or anyone else will be permitted to assert SPNV's rights in any Federal or state forum whatsoever. Additionally, the decision below brings into question the enforceability of this nation's entire complex of treaties of Friendship, Commerce and Navigation.

This case, on the merits, involves important issues relating to state unitary taxation of United States subsidiaries of a foreign parent company which were left unresolved by *Container Corporation of America v. Franchise Tax Board*, 103 S. Ct. 2933 (1983). However, the lower Federal courts have thus far barred petitioner from raising such issues on standing and ripeness grounds. The questions thus presented to this Court are:

1. Does SPNV have standing in Federal court to assert that the imposition of such unitary taxation violates its rights under the Netherlands FCN Treaty?

2. Does SPNV have standing in Federal court to assert that the double taxation of its interests arising from the imposition of such unitary taxation violates its rights under the Foreign Commerce Clause, the Due Process Clause and international law?

3. Does SPNV have standing in Federal court to assert that California's burdensome demands (enforced by huge penalties) for extensive information relating to the affairs of SPNV and its worldwide affiliates, which is available if at all only to SPNV, violate SPNV's rights under the Netherlands FCN Treaty, the Constitution and international law?

4. Are SPNV's treaty-based, constitutional and international law claims ripe for adjudication, given California's unrelenting eight-year assertion of unitary treatment for SPNV and its affiliates and its related insistence on such burdensome informational demands?

PARENTS, AFFILIATES AND SUBSIDIARIES OF PETITIONER SPNV

Sixty percent of the shares of petitioner SPNV are owned by Royal Dutch Petroleum Company ("Royal Dutch") and 40% by The "Shell" Transport and Trading Company, p.l.c. ("Shell Transport"). Royal Dutch is a publicly-held Netherlands company, the shares of which are listed on various stock exchanges including the Amsterdam Stock Exchange and the New York Stock Exchange ("NYSE"). Shell Transport is a publicly-held English company, the shares of which are listed on various stock exchanges including the London Stock Exchange and the NYSE. SPNV owns approximately 69% of the shares of Shell Oil Company, a Delaware corporation, the shares of which are listed on various stock exchanges including the NYSE. SPNV also owns approximately 79% of the equity interest in Shell Canada Limited, a Canadian corporation, the shares of which are listed on various stock exchanges including the Toronto Stock Exchange. Other companies in which Royal Dutch and Shell Transport hold equity interests, directly or indirectly, are listed in the Appendix at pages 90a-146a.

TABLE OF CONTENTS

	Page
Table of Authorities	vii
Prior Opinions	1
Jurisdiction	2
Constitutional Provisions and Treaties Involved	2
Statement of the Case	2
Statement of Facts	3
(a) The FCN Treaties	3
(b) SPNV and Its United States Enterprises	3
(c) The Board's Application of the Unitary Tax	4
(i) Shell Oil	5
(ii) Scallop Nuclear	8
The Proceedings Below	8
(a) The Complaint	8
(b) Decision of the District Court	10
(c) Decision of the Court of Appeals	11
Reasons Why the Writ Should Be Granted	11
The Underlying Issues in This Case Are of International Importance	11
This Case Brings into Question Limits of State Unitary Taxation Not Resolved in *Container*	12
This Case Brings into Question the Enforceability of the Whole Body of FCN Treaties	12
I. The Decision of the Court Below Prevents SPNV from Raising Its Claims in Any United States Forum and Deprives the Netherlands FCN Treaty of Substantive Content	13
(a) The Netherlands FCN Treaty Provides Specific Protections for Companies of The Netherlands	13
(b) SPNV Seeks to Assert Rights Accorded It by the Netherlands FCN Treaty	18

Page

(c) SPNV Seeks to Show that Its Rights Under the Foreign Commerce and Due Process Clauses Have Been Violated 21

(d) SPNV Seeks to Show that the Informational Demands Violate the Rights of SPNV Under the Netherlands FCN Treaty 23

(e) If SPNV Does Not Have Standing to Assert Its Rights, It Is Unlikely that Any Party Does 24

II. This Case Is Ripe for Adjudication 25

(a) The Decision of the Court Below Has Improperly Transformed the Ripeness Doctrine into a Requirement of Vicarious Total Exhaustion of State Remedies by Another Person in Another Proceeding..... 25

(b) The Tax Injunction Act Is Not Applicable..... 26

(c) This Case Is Ripe Under Traditional Requirements 27

(d) Protests of Foreign Governments 29

Conclusion 30

TABLE OF AUTHORITIES

Cases	Page
Abbott Laboratories v. Gardner, 387 U.S. 136 (1967)	27, 28
Alcan Aluminum Ltd. v. Franchise Tax Board, No. 83-7236, slip op. (2d Cir. June 17, 1983)	11
American Power & Light Co. v. Securities & Exchange Commission, 325 U.S. 385 (1945)	20
Association of Data Processing Service Organizations, Inc. v. Camp, 397 U.S. 150 (1970)	18
Boston Stock Exchange v. State Tax Commission, 429 U.S. 318 (1977)	18
Bryant v. Yellen, 447 U.S. 352 (1980)	18
Capitol Industries-EMI, Inc. v. Bennett, 681 F.2d 1107, (9th Cir.), *cert. denied*, 455 U.S. 943 (1982)	10, 25, 26
Container Corporation of America v. Franchise Tax Board, 103 S. Ct. 2933 (1983)	ii, 2, 5, 12, 17, 21, 22
Cook v. United States, 288 U.S. 102 (1933)	14, 27
Duke Power Co. v. Carolina Environmenal Study Group, Inc., 438 U.S. 59 (1978)	18
Edye v. Robertson, 112 U.S. 580 (1884)	14
EMI Ltd. v. Bennett, 560 F. Supp. 134 (N.D. Cal.), *cert. denied*, 103 S. Ct. 570 (1982), *appeal docketed*, No. 82-4611 (9th Cir. Oct. 19, 1982)	12
Fair Assessment in Real Estate Association, Inc. v. McNary, 454 U.S. 100 (1981)	27
Geofroy v. Riggs, 133 U.S. 258 (1890)	14, 16
Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91 (1979)	18
Hans Rees' Sons, Inc. v. North Carolina ex rel. Maxwell, 283 U.S. 123 (1931)	22
Harmsen v. Smith, 542 F.2d 496 (9th Cir. 1976)	20
Japan Line, Ltd. v. County of Los Angeles, 441 U.S. 434 (1979)	21, 22
Kolovrat v. Oregon, 366 U.S. 187 (1961)	14
Lonrho Ltd. v. Shell Petroleum Company Ltd., 1 W.L.R. 627 (House of Lords 1980)	24

	Page
McCulloch v. Sociedad Nacional de Marineros de Honduras, 372 U.S. 10 (1963)	29
Monroe v. Pape, 365 U.S. 167 (1961)	26
Nielsen v. Johnson, 279 U.S. 47 (1929)	15
Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Commission, 103 S. Ct. 1713 (1983)	27, 28
Patsy v. Board of Regents, 457 U.S. 496 (1982)	26, 27
Simon v. Eastern Kentucky Welfare Rights Organization, 426 U.S. 26 (1976)	18
Sumitomo Shoji America, Inc. v. Avagliano, 457 U.S. 176 (1982)	14, 25
Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464 (1982)	18
Warth v. Seldin, 422 U.S. 490 (1975)	3
United States Constitution	
U.S. Const. art. I, § 8, cl.3 (Foreign Commerce Clause)	2
U.S. Const. art. III, § 2 (Federal Judicial Power Clause)	2, 10
U.S. Const. amend. XIV, § 1 (Due Process Clause)	2, 10
Treaties	
Convention of Establishment between the United States of America and France, entered into force December 21, 1960, 11 U.S.T. 2398, T.I.A.S. No. 4625	9, 17
Treaty of Friendship, Commerce and Navigation between the United States of America and the Kingdom of The Netherlands, entered into force December 5, 1957, 8 U.S.T. 2043, T.I.A.S. No. 3942	*passim*
Statutes	
28 U.S.C. § 1254	2
28 U.S.C. § 1331	9
28 U.S.C. § 1332	9
28 U.S.C. § 1341	10, 26, 27
28 U.S.C. § 1343	9
42 U.S.C. § 1983	9, 26, 27
California Revenue and Tax Code §§ 25120-25140 (West 1979)	5

Page

Other Authorities

Committee on Fiscal Affairs of the Organization for Economic Cooperation and Development, *Model Double Taxation Convention on Income and on Capital*, Fed. Taxes: Tax Treaties (P-H) ¶ 1017 at Art. VII ¶ 1 (1977) 16, 17

Hearing on Treaties of Friendship, Commerce and Navigation Between the United States and Colombia, Israel, Ethiopia, Denmark, and Greece Before the Subcomm. on Commercial Treaty and Consular Conventions of the Senate Comm. on Foreign Relations, 82d Cong., 2d Sess. 5 (1952) 15

Model Bilateral Convention for the Prevention of the Double Taxation of Income and Property (Mexico Draft 1943; London Draft 1948), League of Nations Document No. C.88.M.88.1946.II.A 16

Restatement (Second) of the Foreign Relations Law of the United States § 140 (1965) 14

Restatement (Second) of the Foreign Relations Law of the United States § 141 (1965) 27

Restatement (Second) of the Foreign Relations Law of the United States § 145 comment b & Reporter's note 1 (1965) 27

S. Exec. Rep. No. 8, 80th Cong., 2d Sess. (1948) 16

S. Rep. No. 1035, 75th Cong., 1st Sess. (1937) 27

United Nations, *Model Double Taxation Convention Between Developed and Developing Countries*, ST/ESA/102 (1980) 17

Walker, *Treaties for the Encouragement and Protection of Foreign Investment*, 5 Am. J. Comp. L. 229 (1956) 3

Wall Street Journal, July 19, 1983, page 29, col. 1 30

No.

In the

Supreme Court of the United States

October Term, 1983

SHELL PETROLEUM N.V.,

Petitioner,

-against-

MICHAEL FRANCHETTI, KENNETH CORY, WILLIAM M. BENNETT, INDIVIDUALLY AND AS MEMBERS OF, AND GERALD H. GOLDBERG, INDIVIDUALLY AND AS EXECUTIVE OFFICER OF, THE FRANCHISE TAX BOARD, STATE OF CALIFORNIA,

Respondents.[1]

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner Shell Petroleum N.V. respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered on June 30, 1983.

PRIOR OPINIONS

The decision of the United States Court of Appeals for the Ninth Circuit is reported at 709 F.2d 593, and is reprinted in the Appendix at pages 1a-7a. The judgment of the Ninth Circuit was entered on June 30, 1983, and is reprinted at page 24a. The unpublished Memorandum and Order of the United States District Court for the Northern District of California (Patel, J.) was dated August 4, 1982, and entered and filed on August 5, 1982. An amended opinion was subsequently issued on August 1, 1983, and is reprinted at pages 8a-23a. Final

[1] Pursuant to Supreme Court Rule 40, the incumbent members of the Franchise Tax Board have been substituted for their predecessors, defendants in the action below.

judgment dismissing the action was dated and filed on August 10, 1982, and entered on August 11, 1982, and is reprinted at page 25a.

JURISDICTION

The judgment of the Court of Appeals affirming dismissal of the action was entered on June 30, 1983. By order dated September 15, 1983, Justice William H. Rehnquist extended the time for filing a petition for writ of certiorari to and including November 1, 1983. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND TREATIES INVOLVED

Article I, § 8, cl. 3 (Foreign Commerce Clause) of the United States Constitution appears at page 26a.

Article III, § 2 (Federal Judicial Power Clause) of the United States Constitution appears at page 26a.

Amendment XIV, § 1 (Due Process Clause) of the United States Constitution appears at page 26a.

The Treaty of Friendship, Commerce and Navigation between the United States of America and the Kingdom of The Netherlands, entered into force December 5, 1957, 8 U.S.T. 2043, T.I.A.S. No. 3942 ("the Netherlands FCN Treaty"), appears at pages 27a-53a.

STATEMENT OF THE CASE

The issues presented by this petition arise from California's eight-year-long campaign to tax the earnings of petitioner Shell Petroleum N.V. ("SPNV") and its more than 900 Royal Dutch/Shell worldwide subsidiaries and affiliates by applying that state's franchise tax to Shell Oil Company ("Shell Oil") and Scallop Nuclear Inc. ("Scallop Nuclear") on a worldwide unitary basis. The case involves on the merits two crucial issues left undecided by the recent decision of this Court in *Container Corporation of America v. Franchise Tax Board*, 103 S. Ct. 2933 (1983) ("*Container*"), namely, (1) whether the "upstream" application of a unitary tax scheme to reach the income of a foreign parent company and its non-United States subsidiaries and affiliates violates the Foreign Commerce and Due Process

Clauses of the United States Constitution and (2) whether such application violates the specific provisions of the Netherlands FCN Treaty.

SPNV's claims have never been heard, however, because the lower courts have held that SPNV does not have standing to raise its treaty-based or constitutional claims and that those claims are not ripe.

STATEMENT OF FACTS

(a) The FCN Treaties.

In the years following the conclusion of World War II, the United States entered into a series of bilateral commercial treaties known as treaties of Friendship, Commerce and Navigation ("FCN treaties"). The primary purpose of those treaties was to provide certain substantive protections for United States commerce abroad, whether conducted by a United States corporation or through the medium of its foreign-incorporated subsidiaries, and reciprocal protections for foreign commerce in this nation.[2] Overall, the United States entered into 23 post-war FCN treaties, 21 of which contained substantially similar provisions.[3] One of such 21 treaties is the Netherlands FCN Treaty, which, *inter alia*, accords certain specific substantive rights to "nationals and companies of [The Netherlands], and to their property, enterprises and other interests".

(b) SPNV and Its United States Enterprises.[4]

SPNV is a company of The Netherlands with its principal place of business in The Hague.[5] SPNV and its affiliated

---

[2] *See, e.g.*, Walker, *Treaties for the Encouragement and Protection of Foreign Investment*, 5 Am. J. Comp. L. 229, 232-33 (1956).

[3] To the extent that the specific provisions of the various FCN treaties vary, each of such 21 treaties incorporates the language of all other such treaties through an unconditional "most-favored-nation" clause.

[4] The ensuing remainder of the Statement of Facts is derived from SPNV's complaint and the affidavits submitted on its behalf in connection with its motion for summary judgment and the respondents' motion to dismiss. For purposes of the decision on standing, these facts must be assumed to be true and must be construed in favor of SPNV. *Warth v. Seldin*, 422 U.S. 490, 501 (1975).

[5] Sixty percent of the shares of SPNV are held by Royal Dutch Petroleum ("Royal Dutch"), a publicly-held company incorporated

company, The Shell Petroleum Company Limited ("Shell Petroleum Ltd."), together hold, directly or indirectly, investments representing interests in more than 900 other Royal Dutch/Shell companies operating in over 100 countries around the world.

During 1967 to 1976, the years relevant to this action ("the relevant period"), SPNV included among its holdings approximately 69% of the outstanding shares of common stock of Shell Oil, a Delaware corporation.[6] Shell Oil has its principal place of business in Houston. During the relevant period, Shell Oil, directly or through its subsidiaries, conducted business in the United States and in various foreign countries. Shell Oil was qualified to do business in California throughout this period.

During the relevant period, SPNV also indirectly owned all the shares of Scallop Nuclear, a Delaware corporation with offices in New York. Scallop Nuclear, incorporated in 1973, was qualified to do business in California in 1974. Scallop Nuclear's activities consisted solely of its participation in General Atomic Company ("General Atomic"), a California partnership owned equally by Scallop Nuclear and Gulf Oil Corporation ("Gulf Oil"). General Atomic's principal business was the development of high-temperature gas-cooled nuclear reactors. The operations of Scallop Nuclear were financed through capital contributions, the funds for which were provided by SPNV. Scallop Nuclear has never been profitable, and the source of its funding from its inception has been SPNV.

(c) The Board's Application of the Unitary Tax.

Respondents are the members and executive officer of the Franchise Tax Board of the State of California ("the Board").

---

in The Netherlands. The remaining 40% of the shares of SPNV are held by The "Shell" Transport and Trading Company, p.l.c. ("Shell Transport"), a publicly-held company incorporated in England. Royal Dutch and Shell Transport also hold 60% and 40%, respectively, of the shares of The Shell Petroleum Company Limited, an English company with its principal place of business in London. None of these four companies is qualified to do business in the United States, and none does business, or has any permanent establishment located, in the United States.

[6] The remaining outstanding shares of Shell Oil common stock were held by more than 30,000 registered stockholders.

The Board is the agency responsible for the administration of California's corporate franchise tax. As administered by the Board, the corporate franchise tax is a "unitary" income tax which measures the state franchise tax liability of corporate taxpayers doing business within and without California by apportioning to California a mathematically determined fraction of the total worldwide income of the "unitary" business of which the taxpayer is deemed to be a part. *See* Cal. Rev. & Tax Code §§ 25120-25140 (West 1979); *Container,* 103 S. Ct. at 2939-40. The California corporate franchise tax rate is then applied to the attributed California income figure to determine the tax due.

(i) *Shell Oil.* For many years prior to 1975, Shell Oil, together with most of its subsidiaries, filed its California franchise tax returns as a consolidated entity. In audits of the tax years prior to 1967, with minor exceptions, the Board accepted Shell Oil and those subsidiaries as the appropriate unitary group. In the audit of the tax years 1967-1971, the Board's agent again initially audited Shell Oil on approximately the same basis as that on which Shell Oil had reported. On August 11, 1975, however, the Board stated its intention to treat the operations of Shell Oil as unitary with the worldwide operations of all Royal Dutch/Shell companies, including SPNV, which are more than 50% owned, either directly or indirectly, by Royal Dutch and Shell Transport. The Board also informed Shell Oil that if Shell Oil chose to contest the Board's novel determination that Shell Oil, its foreign parent and that foreign parent's overseas affiliates were a unitary business for purposes of California's franchise tax, the Board would demand extensive further information regarding the operations of all Royal Dutch/Shell companies.

Shell Oil subsequently notified the Board of its intention to contest the unitary determination, and by letter dated September 22, 1976, the Board made an extensive demand for further information. Most of the demand concerned the business activities of Royal Dutch/Shell companies not doing business in California or the United States. The Board demanded, *inter alia,* a listing, by name and amount, of every crude oil transaction between any of the more than 900 Royal Dutch/Shell companies during the years 1967 through 1971,

detailed information concerning the internal affairs of each of those companies, and a listing of all amounts paid by each Royal Dutch/Shell company to any of the four principal Royal Dutch/Shell service companies existing during the years 1967 through 1971. These questions would require answers covering hundreds of thousands, if not millions, of transactions or items. Shell Oil responded to this demand to the best of its ability. However, most of the information demanded by the Board was not in the possession or control of Shell Oil, and Shell Oil so informed the Board. Notwithstanding this, by letter dated October 18, 1977, the Board made a similar informational demand for the years 1972-1976.

Shell Oil sought to obtain from SPNV the information demanded by the Board regarding Royal Dutch/Shell companies other than Shell Oil. Without conceding the legality of the Board's demand for information, SPNV voluntarily supplied certain information which was available to it,[7] even though large amounts of time and expense were required to provide the responses. Relying in part upon information supplied by SPNV, Shell Oil made extensive informational submissions to the Board.

On December 16, 1977, the Board issued to Shell Oil Notices of Proposed Additional Tax Assessments ("NPAs") for the tax years 1967-1971.[8] An NPA for the tax year 1972 was issued on February 14, 1978. The total proposed additional tax for 1967-1972 was $35,660,909. In arriving at the tax, the Board attributed to Shell Oil in California a portion of the combined income of the Royal Dutch/Shell companies which is equivalent to 92.6% of the consolidated worldwide income of Shell Oil and its subsidiaries for the years 1967-1972, even though only approximately 20% of Shell Oil's property, payroll and sales was located in California. For three of the years, the Board attributed more than 100% of Shell Oil's consolidated income to California, and for one year, the Board attributed

---

[7] Much of the detailed information demanded is only available in the records of SPNV's hundreds of affiliates.

[8] Unless protested within 60 days, the NPAs become final assessments on which payment is due.

420% of Shell Oil's worldwide income to California.[9] The NPAs also included penalties of $8,915,228, representing 25% of the proposed total additional tax for those years, assessed on account of Shell Oil's alleged failure to provide the information demanded by the Board concerning Royal Dutch/Shell companies other than Shell Oil. The total amount of additional tax and penalties asserted is $44,576,137.

Shell Oil filed a timely protest of the NPAs for 1967-1972 by letters dated February 13, 1978, and April 10, 1978. Shell Oil contested both the Board's unitary determination and the amounts of the NPAs. By letter dated September 21, 1979, Shell Oil petitioned the Board to restrict its unitary determination to comprise only Shell Oil and those of its subsidiaries which had joined together in filing consolidated Federal tax returns. Although more than five years have elapsed since the protests, the Board has taken no action to abandon or modify

---

[9] Set forth below for the years 1967-1972 is a tabular comparison of the total consolidated income earned by Shell Oil and its subsidiaries from all sources as reported to the Internal Revenue Service (after audit adjustments agreed upon by Shell Oil and the IRS), the amount of income attributed by the Board to California on a "unitary" basis, the amount of income so attributed as a percentage of all Shell Oil's consolidated income and the percentage of Shell Oil's property, payroll and sales located in California as reported to the Board:

Years	Shell Oil's Consolidated Worldwide Income as Reported to the IRS (After Agreed Audit Adjustments)	Portion of Combined Income of Royal Dutch/Shell Companies Attributed by the Board to Shell Oil in California	Percent of Attributed California Income to All of Shell Oil's Consolidated Income	Percent of Shell Oil's Property, Payroll and Sales in California as Reported to the Board
1967.....	$152,654,000	$ 81,885,000	53.6%	20.5%
1968.....	175,877,000	104,797,000	59.6%	20.5%
1969.....	22,139,000	92,993,000	420.0%	20.0%
1970.....	61,630,000	89,115,000	144.6%	19.4%
1971.....	87,505,000	113,062,000	129.2%	17.2%
1972.....	157,426,000	126,444,000	80.3%	15.3%
Total.....	$657,231,000	$608,296,000	92.6%	18.8% (average)

its unitary position or to adjust the NPAs as a result of the protests, petition or information submitted by Shell Oil in response to the Board's requests.[10]

(ii) *Scallop Nuclear.* Prior to 1973, Scallop Nuclear was not in existence. During the relevant period since 1973, Scallop Nuclear filed California franchise tax returns in which Scallop Nuclear itself was the unitary entity for purposes of apportionment of income. In connection with its audit of Scallop Nuclear for the tax years 1973-1976, the Board, on February 16, 1978, made a very extensive demand on Scallop Nuclear for further information, similar to portions of the September 22, 1976, demand on Shell Oil. Most of the information demanded by the Board was not in the possession or control of Scallop Nuclear.

During the years 1973-1976, the General Atomic partnership between Scallop Nuclear and Gulf Oil incurred aggregate book losses of $780,218,000, of which Scallop Nuclear's share was one-half, or $390,109,000. Since Scallop Nuclear had no other business activities, those losses constituted its only "income" in California or elsewhere. Board auditors, however, have informed Scallop Nuclear that it will be treated as part of a unitary business which consists of all Royal Dutch/Shell companies worldwide. The Board proposes to apportion to Scallop Nuclear California income of approximately $46,000,000 for the period 1973-1976. The proposed tax assessments on this figure will be approximately $4,350,111.

THE PROCEEDINGS BELOW

(a) The Complaint.

On November 4, 1981, SPNV filed a complaint in Federal District Court alleging that the Board has violated its rights under the Netherlands FCN Treaty, the United States Constitution and general principles of international law. SPNV

[10] The Board is now preparing to issue NPAs to Shell Oil for the tax years 1973-1976. Those NPAs will be based on an alleged unitary business consisting of all Royal Dutch/Shell companies and may also include a penalty for failure to supply all the information demanded by the Board.

seeks both declaratory and injunctive relief from the alleged violations.[11]

In particular, SPNV alleges that the Board, by combining, apportioning and taxing the worldwide income of SPNV and all its subsidiaries and affiliates, has violated the Netherlands FCN Treaty by (1) denying "fair and equitable treatment" to SPNV and its "property, enterprises and other interests" (Art. I, ¶ 1); (2) taking "unreasonable or discriminatory measures that would impair the rights or interests" of SPNV in its "capital" and in its "enterprises and the property thereof" (Art. VI, ¶ 3); (3) imposing a tax upon income "in excess of that reasonably allocable or apportionable" to California (Art. XI, ¶ 4); (4) denying most-favored-nation treatment (Art. XI, ¶ 3) to SPNV by treating SPNV and its subsidiaries and affiliates in a manner violative of other FCN treaties[12] and (5) denying national treatment (Art. XI, ¶ 1) to SPNV by treating SPNV in a manner violative of the Constitution and according treatment to the United States subsidiaries of SPNV which is less favorable than that accorded certain unrelated United States corporations.

SPNV also challenges the Board's informational demands as an extraterritorial exercise of inquisitorial powers, in violation of SPNV's rights under the Netherlands FCN Treaty and international law.

SPNV alleges that the Board has violated the Foreign Commerce Clause by interfering with the Federal Government's ability to speak with one voice, through its network of treaties, in foreign affairs and by imposing a burden of multiple taxation on foreign commerce. Such burden, as well the underlying combination and apportionment of the income of a local subsidiary with that of its foreign parent company, is also violative of international law. Finally, SPNV claims that the

---

[11] The District Court's jurisdiction was properly invoked pursuant to 42 U.S.C. § 1983 and 28 U.S.C. § 1343 (the Civil Rights Act of 1871), 28 U.S.C. § 1331 (the general Federal question statute), 28 U.S.C. § 1332 (the jurisdictional grant for diversity of citizenship), and under principles of pendent and ancillary jurisdiction.

[12] See, for example, Article IX, ¶ 4, of the Convention of Establishment between the United States of America and France, quoted in note 22 *infra*.

Board has violated the Due Process Clause by seeking to tax income with no nexus to California and by seeking to tax income out of all proportion to the activities of Shell Oil and Scallop Nuclear in California.

(b) Decision of the District Court.

SPNV moved for summary judgment, and the Board moved to dismiss the complaint. After briefing and argument, the District Court granted the Board's motion to dismiss the complaint.[13] The District Court first held that SPNV does not have standing to raise its claims. The District Court found that SPNV had satisfied the "injury in fact" requirement of Article III of the Constitution. App. at 16a. The Court concluded, however, that SPNV could not meet the "prudential" requirements that the would-be plaintiff assert its own legal rights and interests and be within the "zone of interests" protected by the legal provision it seeks to invoke. App. at 19a-20a. Specifically, the District Court held that SPNV could not assert its constitutional challenges to the taxation because it was merely a shareholder of the corporations to which the informational demands and NPAs were addressed. As to SPNV's treaty-based claims, the Court held that SPNV was not within the zone of interests protected by the Netherlands FCN Treaty. Unwilling to "strain to read into the Treaty an implied right . . . [in SPNV] not shared by other U.S. corporations", the Court concluded that SPNV could not claim any rights under the Treaty because only "a company of the Netherlands which itself transacts business in the United States falls within the zone of interests sought to be protected by the [Netherlands FCN] Treaty". App. at 19a.

The District Court also held that SPNV's claims were not ripe. The claims relating to the taxation of Scallop Nuclear were not ripe, according to the Court, because NPAs had not been issued to that company. Notwithstanding the issuance of

[13] The District Court rejected the Board's contention that 28 U.S.C. § 1341 barred the action. It held that SPNV could not participate in the state tax proceedings since it is not the nominal taxpayer and therefore did not have a plain, speedy and efficient state remedy. App. at 14a. *See Capitol Industries-EMI, Inc. v. Bennett*, 681 F.2d 1107, 1118-19 (9th Cir.), *cert. denied*, 455 U.S. 943 (1982).

NPAs to Shell Oil, the Court also held unripe SPNV's claims relating to that company because "the [franchise tax] statute has not been fully applied" to Shell Oil. App. at 22a.

(c) Decision of the Court of Appeals.

The Court of Appeals for the Ninth Circuit affirmed. On the standing issue, that Court interpreted the Netherlands FCN Treaty as merely providing Netherlands companies with the right to conduct business in the United States on an equal basis with United States corporations. Because a domestic corporation holding a majority interest in Shell Oil or Scallop Nuclear would not, in that Court's view, have standing to challenge the taxation, it held that SPNV could not do so either. App. at 4a-5a. The Court of Appeals implicitly rejected SPNV's standing to raise its constitutional challenges to the Board's action by affirming the District Court without addressing the issue. On the ripeness issue, the Court of Appeals held that although the Tax Injunction Act was inapplicable to SPNV's claims, the principles underlying that Act required a finding that SPNV's claims were not ripe because "Shell [Oil] and Scallop [Nuclear] have plain, speedy, and efficient administrative and state court remedies". App. at 6a.

REASONS WHY THE WRIT SHOULD BE GRANTED

The Underlying Issues in This Case Are of International Importance. The underlying unitary tax issues involved in this case are regarded as highly important by a substantial number of the major trading partners of the United States. Many of the closest allies of the United States, either individually or collectively, have repeatedly issued notes expressing concern, filed *amicus curiae* briefs in various proceedings or suggested the possibility of reprisals, all without avail. This case clearly presents the question whether a state, such as California, has the legal power under the Constitution, the FCN treaties and international law to impose unitary taxation on a combined worldwide basis on United States subsidiaries of foreign parent companies.[14] The determination of that question, however, will

---

[14] Other cases now before the Federal courts also involved the Foreign Commerce Clause question. *See Alcan Aluminum Ltd. v. Franchise Tax Board,* No. 83-7236, slip op. (2d Cir. June 17, 1983);

be deferred into the remote future, and possibly prevented altogether, if the decision of the court below is allowed to stand.

This Case Brings into Question Limits of State Unitary Taxation Not Resolved in Container. In this case SPNV seeks to present to the Federal courts two important issues with respect to the legally permissible limits of state unitary taxation which were not resolved in *Container*. The first issue involves the question, which was specifically reserved in *Container*, whether the "upstream" unitary taxation of the income of a foreign parent company on the basis of the operations of its United States subsidiaries violates the rights of the foreign parent under the Foreign Commerce Clause.[15] The second issue, which was not even considered in *Container*, is whether such "upstream" unitary taxation of a foreign parent company's income violates the rights of the foreign parent under an FCN treaty that specifically protects it.

This Case Brings into Question the Enforceability of the Whole Body of FCN Treaties. The rationale employed by the

---

EMI Ltd. v. Bennett, 560 F. Supp. 134 (N.D. Cal.), *cert. denied*, 103 S. Ct. 570 (1982), *appeal docketed*, No. 82-4611 (9th Cir. Oct. 19, 1982). The present case, however, involves the additional question regarding the effect of the Netherlands FCN Treaty. That question is not present in the cases cited above because neither Canada, the home country of Alcan, nor the United Kingdom, the home country of EMI, has an FCN treaty with the United States.

[15] 103 S. Ct. at 2952 n.26 & 2956 n.32. *Container* involved the "downstream" unitary taxation of a United States parent corporation which had foreign subsidiaries. There is a significant distinction between the "downstream" and "upstream" cases of unitary taxation. In the former case, the taxpayer is a United States parent company which has an economic interest in the income of its foreign subsidiaries. In the latter case, the taxpayer is a United States subsidiary that does not have even an indirect interest in the income of its foreign parent company or of the foreign subsidiaries of such parent company. Thus, by taxing "upstream", the state includes in the apportionment base of the United States subsidiary income of the foreign parent and its foreign subsidiaries which the United States subsidiary never can receive, which it has no power to repatriate and in which it has no economic interest. That distinction between the "upstream" and "downstream" cases aggravates the inequitable treatment in the "upstream" case and greatly enhances the international ramifications in that case.

court below to avoid dealing with those issues has created a new issue of international importance. Under the guise of determinations of standing and ripeness, that court has effectively eviscerated SPNV's substantive protections under the Netherlands FCN Treaty and has threatened to undermine the entire complex of FCN treaties into which this nation has entered. The decision below thus raises the important Federal question whether the entire body of FCN treaties can be enforced in the Federal courts. The lack of resolution of that question threatens to impair adversely the foreign relations of this nation.

I. The Decision of the Court Below Prevents SPNV from Raising Its Claims in Any United States Forum and Deprives the Netherlands FCN Treaty of Substantive Content.

The Court of Appeals held that SPNV did not have standing to raise its treaty-based claims because it was not within the zone of interests to be protected by the Netherlands FCN Treaty. The Court of Appeals' standing decision is based exclusively upon its determination that the Netherlands FCN Treaty provides solely for national treatment—*i.e.*, that companies of The Netherlands are entitled only to those rights that would be available in the United States to United States corporations in the same position. This radical restriction of the scope of the Netherlands FCN Treaty is unsupportable, for it ignores the plain language of the Treaty, as well as its history and purpose. Unless reversed, the judgment of the Court of Appeals threatens to eviscerate the Netherlands FCN Treaty, as well as all other FCN treaties.

(a) The Netherlands FCN Treaty Provides Specific Protections for Companies of The Netherlands.

While the Netherlands FCN Treaty does indeed provide for national treatment, it also explicitly creates certain specific substantive protections that go far beyond such treatment and vest absolute rights in companies of The Netherlands operating in the United States and companies of the United States operating in The Netherlands. For instance, the Treaty:

> (i) requires that "fair and equitable treatment [be accorded] to the nationals and companies of [The Nether-

lands], and to their property, enterprises and other interests" (Art. I, ¶ 1);

(ii) prohibits "unreasonable or discriminatory measures that would impair the rights or interests . . . of nationals and companies of [The Netherlands], whether in their capital, or in their enterprises and the property thereof . . ." (Art. VI, ¶ 3); and

(iii) prohibits the imposition or application of any tax upon income "in excess of that reasonably allocable or apportionable" to the taxing jurisdiction "[i]n the case of companies of [The Netherlands]" (Art. XI, ¶ 4).

Unless the main body of the Treaty is to be ignored, as it manifestly should not be, the Court of Appeals' holding makes no sense. Indeed, it flies in the face of the plain language of the Treaty and contravenes the well established rule that treaties are to be liberally construed. *See, e.g., Kolovrat v. Oregon*, 366 U.S. 187, 193, 194 (1961); *Geofroy v. Riggs*, 133 U.S. 258, 271-72 (1890).

Apparently, the Court below lost sight of the crucial fact that a treaty is an international agreement between two sovereign nations that may well grant on a reciprocal basis absolute rights or privileges to nationals of the other party, whether or not such rights are available to domestic persons.[16] *E.g., Cook v. United States*, 288 U.S. 102 (1933); *Edye v. Robertson*, 112 U.S. 580 (1884); Restatement (Second) of the Foreign Relations Law of the United States § 140 (1965). The Court ignored the fact that the many FCN treaties were entered into (primarily at the behest of the United States) for the express purpose of granting certain absolute substantive protections to foreign business investments, irrespective of the protections

[16] In support of its holding, the Court of Appeals relied upon dictum in *Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176 (1982), relating to national treatment that has no bearing on the questions presented in this case. The sole issue in *Sumitomo Shoji* was whether an American subsidiary of a Japanese parent company was a "company of Japan" for purposes of the Japanese FCN Treaty. *Id.* at 189. In contrast, this case presents the issue whether a company of The Netherlands can rely on provisions in the Netherlands FCN Treaty that seek to provide companies of the Netherlands with certain absolute protections.

afforded by the domestic laws of the treaty parties. For example, they were specifically intended to ensure that a United States investment in a foreign nation would not be subject to confiscation without compensation even if nationals of that foreign nation could be so treated.[17] To say that a company whose investments are protected by an FCN treaty is subject to whatever treatment is meted out to local companies utterly misconceives the entire purpose of the protections conferred by the modern FCN treaties.

Indeed, Article XI, ¶ 4 of the Netherlands FCN Treaty (which, of the Treaty articles relevant to this case, is the one specifically addressing taxation) is a compelling example of a Treaty provision that provides an absolute standard of protection for companies such as SPNV. That Article prohibits United States governmental authorities, including respondents, from imposing any tax upon income "in excess of that *reasonably allocable or apportionable* to [the] territories [of the taxing authority]" (emphasis supplied).[18] This language is based upon an international consensus requiring that local subsidiaries be taxed only on the basis of their separate accounts, adjusted as necessary to account for any transactions between related enterprises that were not on an arm's-length basis. That principle of international law was developed to protect foreign companies against attempts by local taxing authorities to

---

[17] *See, e.g., Hearing on Treaties of Friendship, Commerce and Navigation Between the United States and Colombia, Israel, Ethiopia, Italy, Denmark, and Greece Before the Subcomm. on Commercial Treaty and Consular Conventions of the Senate Comm. on Foreign Relations*, 82d Cong., 2d Sess. 5, 8 (1952) (statement of Harold F. Linder, Dep. Ass't Sec'y of State for Economic Affairs) (purpose of FCN treaties is to protect from inequitable extraterritorial taxation United States corporations that operate through foreign-incorporated subsidiaries).

[18] Unlike some tax treaties that explicitly apply only to conduct by the Federal government, most modern commercial treaties such as the Netherlands FCN Treaty are applicable to subnational governmental entities as well as the Federal government. *See, e.g., Nielsen v. Johnson*, 279 U.S. 47, 50-51 (1929). In the District Court, the Board conceded that the Netherlands FCN Treaty would apply to state taxation efforts. *See* Defendants' Memorandum in Opposition to Plaintiff's Motion for Summary Judgment at 19.

overreach by basing their taxes on income not fairly allocable to a local subsidiary or permanent establishment.[19]

The development of modern principles of international law applicable to assertions of national and subnational taxing powers derives from the work of the League of Nations. The position of the League was that foreign companies doing business in the taxing country through a "permanent establishment" could be taxed only on the income "produced in" or "derive[d]" in the territories of the taxing state.[20] To determine what income was "derived" or "produced" within the taxing country, the League proposed reliance on the separate accounts of the permanent establishment, treating each permanent establishment as an enterprise independent of any foreign parent company. Income from transactions between related enterprises was to be determined as if the transactions were between "independent persons dealing at arms' length", and the separate accounts of the permanent establishment could be "rectif[ied]" "when necessary". Protocol, Art. VI, ¶ 1(B) (Mexico Draft; London Draft). The League's draft conventions forbade the consolidation or combination of the foreign parent company with its domestic subsidiary for tax purposes.

The League's position with respect to international limitations on state taxation powers was adopted and continued by a number of international organizations, including those of which the United States is a member.[21] That universally accepted

---

[19] Courts have long recognized that international treaties are based upon and informed by prevailing principles of international law. *See Geofroy v. Riggs*, 133 U.S. 258, 271 (1890). Moreover, the series of modern FCN treaties was expressly "based upon the principles of international law and practice as reflected in modern international procedures". *See* S. Exec. Rep. No. 8, 80th Cong., 2d Sess. 1 (1948). Accordingly, interpretation of modern FCN treaties must be made in the context of the established international law and practice on which they are based.

[20] *See Model Bilateral Convention for the Prevention of the Double Taxation of Income and Property*, Art. IV, ¶ 3; Protocol, Art. VI, ¶ 1(A) (Mexico Draft 1943; London Draft 1946), League of Nations Document No. C.88.M.88.1946.II.A.

[21] *See, e.g.*, Committee on Fiscal Affairs of the Organization for Economic Cooperation and Development, *Model Double Taxation*

principle was the backdrop for, and gives precise content to, the "reasonably allocable" language of Article XI, ¶ 4 of the Netherlands FCN Treaty.[22]

By limiting the protection of the Netherlands FCN Treaty to the relative protection of national treatment, the lower court has ignored the text and history of Article XI, ¶ 4 and has destroyed all the absolute protections specifically provided by the Treaty. If the lower court's decision is allowed to stand, it will have deprived companies of The Netherlands of the protections envisioned by the draftsmen of the Treaty as necessary to foster free trade between this nation and The Netherlands by reading out of the Treaty all explicit provisions save the one on national treatment. And, reciprocally, the decision will thereby have deprived United States corporations operating in The Netherlands and in other countries with which

---

Convention on Income and on Capital, Fed. Taxes: Tax Treaties (P-H) ¶ 1017 at Art. VII, ¶ 1 (1977); United Nations, *Model Double Taxation Convention Between Developed and Developing Countries* ST/ESA/102 (1980) (validity of arm's-length principle of taxation recognized and adopted). *See also Container Corporation of America v. Franchise Tax Board*, 103 S. Ct. at 2952 (majority opinion) & 2957-58 (dissenting opinion).

[22] The Convention of Establishment between the United States of America and France, entered into force December 21, 1960, 11 U.S.T. 2923, T.I.A.S. No. 4625, is substantially similar to the Netherlands FCN Treaty and specifically adopts the arm's-length method as the only proper measure of taxation:

> "The nationals, companies and associations of either High Contracting Party [that are engaged in trade or other gainful pursuit within the territories of the other High Contracting Party, whether or not through a permanent establishment or a fixed place of business] shall not be subject, within the territories of the other High Contracting Party, to any form of taxation upon capital, income, profits or any other basis, except by reason of the property which they possess within those territories, the income and profits derived from sources therein, the business in which they are there engaged, the transactions which they accomplish there, or any other basis of taxation directly related to their activities within those territories."

Art. IX, ¶ 4. By reason of the unconditional most-favored-nation clause of the Netherlands FCN Treaty's taxation article, Art. XI, ¶ 3, SPNV is entitled to the protections of that Convention with France.

the United States has FCN treaties of those same substantive protections.

(b) SPNV Seeks to Assert Rights Accorded It by the Netherlands FCN Treaty.

Had the Court of Appeals applied traditional standing analysis, there would be no question that SPNV has standing to raise its treaty-based claims in Federal court. For a plaintiff to have standing to bring an action, it must allege that it "personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant", *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 99 (1979), and the injury must be one "likely to be redressed by a favorable decision" by the court, *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 38 (1976). Additionally, the plaintiff must meet certain prudential requirements, the most relevant of which is the requirement that the plaintiff's complaint "arguably" fall within the "zone of interests to be protected or regulated by the statute or constitutional guarantee in question". *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150, 153 (1970). *See also Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 474-75 (1982).

In the present case, the courts below properly held that SPNV's allegations satisfy the "injury in fact" requirement for standing. The Board's application of its unitary tax system to Shell Oil and Scallop Nuclear on a worldwide basis economically injures SPNV, for SPNV will have to make capital contributions to fund Scallop Nuclear's tax payments, and SPNV will suffer a diminished return on its investment in Shell Oil if Shell Oil must pay the artificially increased tax. Further, only SPNV can satisfy the Board's informational demands, and unless it does so, it will see coercive penalties visited upon its subsidiaries, which will, in turn, diminish its investments therein. These effects are more than sufficient to satisfy the "injury in fact" requirement for standing. *See, e.g., Bryant v. Yellen*, 447 U.S. 352, 366-68 (1980); *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 74-75 & n.20 (1978); *Boston Stock Exchange v. State Tax Commission*, 429 U.S. 318, 320 n.3 (1977).

It is equally clear that SPNV "arguably" falls within the "zone of interests to be protected" by the Netherlands FCN Treaty. The fundamental purpose of that Treaty was to accord certain defined protections to companies such as SPNV. For example, the Treaty: (1) requires that Netherlands companies be treated fairly and equitably, with respect "to their property, enterprises and other interests", Art. I, ¶ 1; (2) prohibits "unreasonable or discriminatory measures that would impair the rights or interests . . . of nationals and companies of [The Netherlands], whether in their capital, or in their enterprises and the property thereof . . .", Art. VI, ¶ 3; and (3) prohibits the imposition or application of any tax upon income in excess of that reasonably allocable or apportionable to the taxing jurisdiction "[i]n the case of companies and of non-resident nationals of [The Netherlands]", Art. XI, ¶ 4. The areas to which such protections are to apply are indicated in Article VII of the Netherlands FCN Treaty, which defines the ways in which Netherlands companies may engage in trade or other gainful pursuit in the United States pursuant to the Treaty. It extends the Treaty's protections to "companies of either Party . . . engaging in all types of commercial, industrial, financial and other activity for gain (business activities) within the territories of the other Party, whether directly or by agent or through the medium of any form of lawful juridical entity".[23]

In light of the plain language of the Treaty, an argument that SPNV is not "arguably" within the zone of interests protected by the Netherlands FCN Treaty is untenable. SPNV is a company of The Netherlands, and it holds significant interests in its enterprises Shell Oil and Scallop Nuclear. SPNV has alleged that the Board has infringed SPNV's rights under the Netherlands FCN Treaty by not according "fair and equitable treatment" to SPNV and its enterprises, by unreasonably impairing SPNV's interests in its enterprises Shell Oil and Scallop Nuclear through its taxation assertions and informa-

---

[23] That same provision also grants companies of The Netherlands rights to engage in trade in the United States "either directly or indirectly through one or more intermediaries, to organize companies under the general company laws of [the United States] and to acquire the controlling interests in companies of [the United States]".

tional demands and by imposing its franchise tax on SPNV's income beyond that reasonably allocable to California.[24]

The assumption by the Court of Appeals that SPNV is challenging conduct that injures only its subsidiaries Shell Oil and Scallop Nuclear is clearly wrong. The very action of California in seeking to base its tax on the combined income of all the Royal Dutch/Shell companies on a unitary basis belies the contention. California is seeking to reach "upstream" to the non-United States income of SPNV and its affiliates. Shell Oil and Scallop Nuclear are mere hooks on which the Board hangs its endeavors to reach SPNV's income from foreign sources. The Board has included in the combination, apportionment and taxation process the income of SPNV, as well as the income of its subsidiaries and affiliates. None of that "upstream" income accrues to or is economically owned by either Shell Oil or

---

[24] The District Court's view that the Netherlands FCN Treaty applies only to situations where a foreign parent company "itself transacts business in the United States" through unincorporated local branches, rather than having locally incorporated subsidiaries, is similarly flawed. The Treaty protects "companies of either Party [operating] within the territories of the other Party, whether directly or by agent or through the medium of any form of lawful juridical entity". Art. VII, ¶ 1. The District Court's opinion is not only inconsistent with the plain language of the Treaty, but since most foreign direct investment is through locally incorporated subsidiaries, it would remove from the Treaty's protections most of the investment activity the two Governments sought to protect.

Furthermore, the District Court's reliance on the fact that SPNV can be characterized as a shareholder of its subsidiaries as a basis for denying standing in this case is misplaced. As this Court has recognized, there are situations in which a shareholder can sue individually to redress injury to the corporation when the shareholder also suffers an injury unique to itself. *See American Power & Light Co. v. S.E.C.*, 325 U.S. 385, 389-91 (1945). *See also Harmsen v. Smith*, 542 F.2d 496, 500-01 (9th Cir. 1976). In this case, SPNV is seeking to remedy injuries that it alone sustains as a result of the Board's actions; no other shareholder of Shell Oil is similarly affected. *See infra* note 26. Additionally, the Netherlands FCN Treaty specifically vests in SPNV the rights it now seeks to invoke, so there can be no question about its standing to sue, regardless of its status as a shareholder of Shell Oil and Scallop Nuclear.

Scallop Nuclear, the nominal taxpayers.[25] In effect, the Board seeks to tax hundreds of millions of dollars of income of the Royal Dutch/Shell companies—more than the total income collectively earned by Shell Oil and Scallop Nuclear for that period. The asserted tax liabilities, if upheld, would result in substantial double taxation of the income of hundreds of Royal Dutch/Shell companies and would reduce the consolidated net worth of the Royal Dutch/Shell companies, as reported in the published financial statements, by tens of millions of dollars.

It is utterly incongruous for the Board to treat SPNV and its affiliates as unitary for the purpose of taxation and for the provision of information, yet to deny that SPNV has standing to contest the legality of such taxation and the informational demands. Given such unitary treatment, SPNV is merely seeking to remedy injuries sustained directly by it, injuries that are distinct from those suffered by Shell Oil and Scallop Nuclear.

(c) SPNV Seeks to Show that Its Rights Under the Foreign Commerce and Due Process Clauses Have Been Violated.

SPNV has challenged the Board's actions as violative of the Foreign Commerce and Due Process Clauses. The Foreign Commerce Clause is meant to prevent states from interfering with this nation's ability to speak with one voice in matters of foreign commerce. *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 450-51 (1979). Of particular concern in this regard is the threat of double taxation of the income of foreign companies, which has the potential for impairing this imperative. *Id.* at 447-48. But, as noted by Justice Powell, "double taxation is inevitable" under California's unitary tax system, as applied in the international context. *Container*, 103 S. Ct. at 2959 (Powell, J., dissenting). And, as the party that sees the income of all its enterprises taxed by the countries where they operate and then again by California, SPNV is the party to feel the direct effects of that double taxation and is the party entitled to raise the claims.[26] Because SPNV feels the direct impact of

---

[25] This is in contrast to the "downstream" taxation imposed in *Container*. *Cf.* note 15 *supra*.

[26] The Board's inclusion of the foreign-based income of other Royal Dutch/Shell companies will lead to an outrageous level of

the double taxation, it has standing to raise its constitutional claims directly. Additionally, the Netherlands FCN Treaty requires "national treatment with respect to access to the courts of justice", Art. V, ¶ 1; by placing SPNV on the same footing with a United States parent corporation that suffers this unique injury, the Treaty assures SPNV of standing to raise this claim.

SPNV's Foreign Commerce Clause claim differs significantly from those made in *Container*. First, *Container* dealt with the "downstream" taxation of foreign subsidiaries of a United States corporation. In contrast, this case concerns California's attempts to apply its unitary tax "upstream" to foreign parent companies and their overseas affiliates, an issue expressly left undecided in *Container*. 103 S. Ct. at 2952 n.26 & 2956 n.32. Second, the threat of disproportionate double taxation is very real in this case,[27] but there is no authoritative international tribunal to which SPNV can turn for relief in this situation. *Cf. Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. at 447-48. Third, this case has raised sensitive issues of foreign policy to a far greater degree than in *Container*. The unitary taxation method is an internationally condemned

---

taxation of Shell Oil and Scallop Nuclear, which causes substantial due process concerns, but those companies will themselves each be presented with only one tax bill from California. Consequently, it is unclear whether they would be in a position to assert that they had suffered from the double taxation. Similarly, SPNV's overseas affiliates do not feel the incidence of the double taxation because they do not pay the California tax assessment. Aside from its parent companies, only SPNV sees its assets diminished twice because of this taxation and thus uniquely feels the unconstitutional burden. Certainly, no other shareholder of Shell Oil is similarly affected.

[27] The Board's actions, if allowed to stand, would effectively attribute to California for the years 1967-1972 a portion of the worldwide income of the Royal Dutch/Shell companies which represents 92.6% of Shell Oil's own consolidated income for those years. During the same years, only 18.8% of Shell Oil's property, payroll and and sales were in California. *See supra* note 9. This percentage is considerably higher than the 66 to 85% figure that was held unconstitutional in *Hans Rees' Sons, Inc. v. North Carolina ex rel. Maxwell*, 283 U.S. 123 (1931). It demonstrates the severity of double taxation that would result from the Board's application of the unitary taxation principle "upstream" to reach SPNV and its overseas subsidiaries and affiliates.

method of taxation that the United States has disavowed in its dealings with foreign nations. The Board's efforts to apply that method to reach the income of an "upstream" foreign parent company have provoked extensive diplomatic notes from the governments of the Kingdom of The Netherlands, the United Kingdom, Canada, Japan, and the members of the European Economic Community. App. 54a—89a. Moreover, the governments of The Netherlands and Japan have filed *amicus curiae* briefs supporting SPNV's claims in the lower courts. The Board's actions cast substantial doubt upon the capacity of the United States to adhere to an existing and binding treaty into which it willingly entered.

It should also be recognized that the foreign policy implications of this case transcend the concerns of those major trading partners that have companies with subsidiaries in this country. The Board has sought, through the media of Shell Oil and Scallop Nuclear, to arrogate to California a considerable portion of the income of the Royal Dutch/Shell companies for taxation. If the laws of the United States sustain that action, any country that has subsidiaries of foreign parent companies operating within its borders could be prompted to adopt comparable unitary taxation laws. In the absence of an authoritative international tribunal to which the foreign parent company could turn, such a practice, once started, could well spread and undermine the functioning arm's-length method of international taxation. Such a development would, of course, involve and adversely affect United States parent corporations. But, given the example of California, the United States Government would hardly be in a position to lodge credible protests on their behalf.

(d) SPNV Seeks to Show that the Informational Demands Violate the Rights of SPNV Under the Netherlands FCN Treaty.

The very substantial and onerous demands for information which have been made by the Board cannot be fully responded to by Shell Oil and Scallop Nuclear. They simply do not have that information and the Board has repeatedly been advised of

that fact.[28] The only parties that can furnish that information are SPNV and its sister company, Shell Petroleum Ltd., if indeed they are able to obtain the demanded information from their affiliates.[29] The imposition of huge penalties on Shell Oil is a patent device to coerce SPNV into obtaining the demanded data at tremendous expense and providing it to the Board. Indeed, Shell Oil is being held hostage to coerce SPNV to submit to the Board's demands. As the target of the coercion, SPNV certainly must have standing to object.

(e) If SPNV Does Not Have Standing to Assert Its Rights, It Is Unlikely that Any Party Does.

Even if the Court of Appeals' decision has not rendered the Netherlands FCN Treaty essentially void, it is highly probable that the net impact of the decision will be to preclude SPNV's treaty claims from ever being raised. Simply put, it is unlikely that any party will be able to raise for judicial consideration in any Federal or state forum SPNV's claims based upon the Netherlands FCN Treaty. This would be true because:

(1) the Court of Appeals has ruled that SPNV has no standing, in the circumstances of this action, to raise rights unquestionably vested in it by the Netherlands FCN Treaty;

---

[28] As noted above, Shell Oil has furnished to the Board, to the best of its ability, information available to it relevant to the Board's request.

[29] *See Lonrho Ltd. v. Shell Petroleum Company Ltd.*, 1 W.L.R. 627, 636 (House of Lords 1980):

> "Shell Mocambique's [a U.K. company which was an indirect subsidiary of Shell Petroleum Ltd. and British Petroleum] documents are not in my opinion within the 'power' of either Shell or B.P. within the meaning of [the discovery order]. They could only be brought within their power either (1) by their taking steps to alter the Articles of Association of Consolidated and procuring Consolidated through its own Board of Directors to take steps to alter the Articles of Association of Shell Mocambique, which [the discovery order] does not require them to do; or (2) by obtaining the voluntary consent of the Board of Shell Mocambique to let them take copies of the documents."

(2) SPNV would be unable to raise such treaty claims in state court because SPNV is not the "taxpayer" involved.[30]

(3) the Board would decline to permit either Shell Oil or Scallop Nuclear to raise such treaty claims in the state administrative proceedings on the ground that the Netherlands FCN Treaty vests no rights in United States subsidiaries of Netherlands companies;[31] and

(4) the Board would assert in any state court proceeding that, if SPNV cannot raise its treaty-based claims, Shell Oil and Scallop Nuclear certainly cannot raise them on behalf of SPNV.

The Court of Appeals has applied a peculiar twist to the standing doctrine. That Court's decision either limits the Netherlands FCN Treaty protections to national treatment or it denies SPNV the right to raise its arguments under the Treaty. Either result is wrong and should be remedied.

II. This Case Is Ripe for Adjudication.

(a) The Decision of the Court Below Has Improperly Transformed the Ripeness Doctrine into a Requirement of Vicarious Total Exhaustion of State Remedies by Another Person in Another Proceeding.

The Court of Appeals held that SPNV's treaty-based claims were in any event not ripe for judicial resolution because Shell Oil and Scallop Nuclear have not exhausted *their* state administrative and judicial remedies. Unless this aberrational interpretation of the ripeness doctrine is reversed, SPNV will be forced to endure extended administrative and judicial proceedings in which it will not be able to participate and in which its position that the Board's actions violated SPNV's rights under the Netherlands FCN Treaty, the Constitution and other principles of law will remain unadjudicated. Meanwhile, SPNV will be obliged to comply with oppressive information

---

[30] *See Capitol Industries-EMI, Inc. v. Bennett*, 681 F.2d 1107, 1118-19 (9th Cir.), *cert. denied*, 455 U.S. 943 (1982).

[31] Transcript of Oral Argument in District Court at 47. *See also Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176 (1982).

demands or risk allowing its subsidiaries to suffer enormous multimillion dollar fines because of SPNV's inability to assert its right not to provide the information.

This inequitable result will obtain because the decision of the Court of Appeals has created a requirement of exhaustion of remedies in contravention of this Court's longstanding rule that a plaintiff need not exhaust its state administrative and judicial remedies before bringing suit under 42 U.S.C. § 1983. *See, e.g., Patsy v. Board of Regents*, 457 U.S. 496, 500-01,516 (1982); *Monroe v. Pape*, 365 U.S. 167, 183 (1961). Although the Court of Appeals acknowledged this Court's decision in *Patsy*, it nonetheless held that this case was not ripe because *Shell Oil* and *Scallop Nuclear* "have plain, speedy, and efficient administrative and state court remedies". App. at 6a. Such a holding, however, saps the *Patsy* holding of all effect by conflating the ripeness and exhaustion doctrines. *Patsy's* reaffirmation of the nonexhaustion rule under § 1983 is meaningless if exactly the same requirement can be imposed under the ripeness doctrine instead. That is particularly true where, as here, plaintiff is told to wait for the completion of the administrative and judicial remedies of another person in another proceeding in which the treaty issues directly involving SPNV cannot be asserted. This Court should not countenance the lower court's obvious disregard for the controlling line of authority.

(b) The Tax Injunction Act Is Not Applicable.

The Court of Appeals tried to buttress its opinion by invoking the "policies" of the Tax Injunction Act, 28 U.S.C. § 1341. Neither § 1341 nor its policies support that court's position. Section 1341 provides that the district courts shall not restrain the assessment of state taxes "where a plain, speedy and efficient remedy may be had in the courts of such State". A foreign parent company in the position of SPNV, however, does not have any remedy in the California state courts because it is not deemed to be the taxpayer. Accordingly, § 1341 is inapplicable by its very terms. *Capitol Industries-EMI, Inc. v. Bennett*, 681 F.2d 1107, 1118-19 (9th Cir.), *cert. denied*, 455 U.S. 943 (1982). As the Congress stressed when it enacted § 1341, "the bill does not take away any equitable right of the

taxpayer or deprive him of his day in Court". S. Rep. No. 1035, 75th Cong., 1st Sess. 2 (1937). Even more, it does not deprive a *nontaxpayer* of his day in court. Because § 1341 does not apply to SPNV's direct action, it makes no sense to use its underlying policies as a basis for undermining the *Patsy* line of authority.[32]

The decision below also flies in the face of longstanding authority that a statute should be construed so as to render it compatible with a treaty. *See* Restatement (Second) of the Foreign Relations Law of the United States § 145 comment b & Reporter's note 1 (1965). Since the Netherlands FCN Treaty exists to promote trade between the two countries, and specifically provides for access to United States courts, § 1341 should be read to avoid any frustration of the Treaty's purpose. In this case, the strained application of § 1341 deprives SPNV, and possibly all other parties, of the opportunity to raise the treaty claims in court. Surely such a result is plainly at odds with this rule. Any apparent conflict between the Netherlands FCN Treaty and § 1341 can, of course, be avoided by applying each of them according to their plain terms.[33]

(c) This Case Is Ripe Under Traditional Requirements.

Application of traditional ripeness requirements leads to the conclusion that SPNV's claims are ripe for adjudication. The "basic rationale" of the ripeness doctrine is to prevent courts "from entangling themselves in abstract disagreements over administrative policies". *Abbott Laboratories v. Gardner*, 387 U.S. 136, 148 (1967). *See also Pacific Gas & Electric Co. v.*

---

[32] This Court's opinion in *Fair Assessment in Real Estate Association, Inc. v. McNary*, 454 U.S. 100 (1981), is not to the contrary. In that case, this Court held that the nonexhaustion rule of § 1983 did not override the Tax Injunction Act and that a taxpayer with plain, speedy and adequate state remedies was barred from bringing a federal action under § 1983. *Id.* at 116. Since SPNV is not the nominal taxpayer and thus has no state remedies available, *McNary* is inapplicable.

[33] Furthermore, to the extent that conflict between § 1341 and the Netherlands FCN Treaty is inevitable, the Treaty provisions, entered into force in 1957, would supersede the provisions of the earlier dated § 1341. *Cook v. United States*, 288 U.S. 102, 118-19 (1933); Restatement (Second) of the Foreign Relations Law of the United States § 141 (1965).

State Energy Resources Conservation & Development Commission, 103 S. Ct. 1713, 1720-22 (1983) (reaffirming *Abbott*). The doctrine is a pragmatic doctrine that focuses on two considerations: "the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration". 387 U.S. at 149-50. SPNV satisfies both parts of this analysis.

First, the issues raised by SPNV's complaint present purely legal questions. This case concerns the application *in principle* of unitary taxation to a Netherlands parent company and its United States subsidiaries. The basic issues involved on the merits are:

(i) Does unitary taxation as asserted by California violate SPNV's rights under the Netherlands FCN Treaty?

(ii) Does unitary taxation as asserted by California violate SPNV's rights under the Foreign Commerce and Due Process Clauses and international law?

(iii) Does forcing SPNV to comply with burdensome and expensive information demands in order to protect its subsidiaries violate SPNV's rights under the Netherlands FCN Treaty, the Constitution and international law, particularly in the absence of answers to questions (i) and (ii)?

It is extremely doubtful that any administrative action by the Board is going to change in a significant manner those basic issues. The Board has been asserting that the Royal Dutch/Shell companies are a unitary business for the past eight years, both in this litigation and at the administrative level, despite the receipt of voluminous factual submissions from Shell Oil.[34] At this date, it is clear that the Board is not going to

---

[34] The factual submissions made by Shell Oil completely answered the questions of the Board insofar as they pertain to the relationship between Shell Oil and any and all Royal Dutch/ Shell companies. Thus, the Board has had all the information needed to make a unitary decision with respect to Shell Oil and certain non-United States Royal Dutch/Shell companies for over five years. It was only with respect to questions pertaining to the relations among the non-United States Royal Dutch/Shell companies that Shell Oil could not fully respond, inasmuch as such information was not available to it, but only to SPNV and its affiliates. *See supra* p.6.

change its mind on the threshhold constitutional and treaty issues involved, and it is apparent that the determinative legal questions involved will not be altered in any way by delay.

Second, the "hardship to the parties of withholding court consideration" is also substantial. The Board has issued NPAs to Shell Oil. These NPAs represent the conclusion of the audit process. Upon receipt of an NPA, a taxpayer must either file an official protest or pay the tax assessment; upon failure to file a protest within 60 days, the sums asserted become due. Thus, the actions of the Board have forced the initiative upon the taxpayer. Moreover, SPNV is threatened with immediate harm because it has been and will continue to be coerced to produce vast quantities of information at great expense. The Board's demands will necessarily have the intended effect of forcing SPNV to comply, notwithstanding SPNV's asserted treaty rights not to do so. The threat of enormous penalties and the risk of preclusion are too great to admit of any other result.

Only now can the threshold legal issues be resolved without forcing SPNV to relinquish its rights and its subsidiaries to undergo further state proceedings which will not address the essential questions presented by SPNV's complaint.

(d) Protests of Foreign Governments.

An independent line of authority also makes it clear that this case is ripe for adjudication. This Court has held that a district court may assert jurisdiction and determine the power of an administrative agency before the agency has completed its proceedings when the controversy "has aroused vigorous protests from foreign governments and created international problems for [the United States] Government." *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 16-17 (1963). Those circumstances are present here. As discussed above, the governments of many of this nation's major trading partners have protested the "upstream" extraterritorial application of the unitary tax to reach foreign parents, and both The Netherlands and Japan have actively participated in this litigation in support of SPNV. *See supra* pp. 22-23. It is clear that the continuing diplomatic turmoil provides "compelling justification for prompt judicial resolution of the controversy over the

Board's power". *Id.* at 17. Insofar as other countries are concerned, this case is not only ripe for adjudication; it cries out for it, and in the most expeditious manner possible.[35]

CONCLUSION

For the reasons stated above, this petition should be granted. In that regard, petitioner respectfully suggests that this Court consider requesting the Solicitor General to present the views of the United States.

In light of the present and continuing concerns expressed by various foreign governments with respect to the underlying treaty, constitutional and international law issues in this case, petitioner further respectfully suggests that, if this petition should be granted, this Court consider the desirability of directing the parties to brief such issues.

October 8, 1983

Respectfully submitted,
PAUL M. DODYK
Counsel of Record

STEWARD R. BROSS, JR.
JOHN R. HUPPER
RICHARD W. CLARY
MICHAEL G. VALENTINI
One Chase Manhattan Plaza
New York, N.Y. 10005
(212) 422-3000

CRAVATH, SWAINE & MOORE
One Chase Manhattan Plaza
New York, N.Y. 10005
(212) 422-3000

McCUTCHEN, DOYLE, BROWN & ENERSEN
Three Embarcadero Center
San Francisco, California 94111
(415) 393-2000
Of Counsel

---

[35] This controversy can only worsen with the increasing willingness of states to adopt unitary tax systems in the face of international opposition to that method of taxation. For instance, the State of Florida recently enacted a unitary tax law in response to this Court's decision in *Container*. *See* Wall Street Journal, July 19, 1983, at 29, col. 1.